**RAMLI SAMAD** A

**v.**

**PACIFIC & ORIENT INSURANCE CO SDN BHD**

COURT OF APPEAL, PUTRAJAYA B
JAMES FOONG JCA
HELILIAH MOHD YUSOF JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NO: W-04-188-2006]
20 NOVEMBER 2009 C

***LABOUR LAW:*** *Workmen's compensation - Insurance - Judgment sum - Liability of insurer to satisfy judgment sum against insured co-employee - Co-employee contributing under Employees' Social Security Act 1969 - Whether s. 31 of same Act prohibited recovery of judgment sum - Tan Peng Loh v. Lee Aik Fong & Anor* D

***ROAD TRAFFIC:*** *Insurance - Judgment sum - Liability of insurer to satisfy judgment sum obtained by worker against insured co-worker - Co-employee contributing under Employees' Social Security Act 1969 - Whether s. 31 of same Act prohibited recovery of judgment sum - Tan Peng Loh v. Lee Aik Fong & Anor* E

The appellant sustained severe injuries when a gas tank fell on him from his employer's motor lorry that was driven by his co-employee. He commenced a negligence action against both his F employer and co-employee for damages in the sessions court. When it transpired that the appellant was a contributor under the Employees' Social Security Act 1969 ('the SOCSO Act'), both the employer and the employee amended their defence alleging that the appellant's claim was barred by s. 31 of the same Act ('s. 31'). G The appellant then withdrew his action against the employer but maintained his action against his co-employee. The appellant managed to obtain an interlocutory judgment against the co-employee as a result of the co-employee's non-appearance on the day of the hearing. Damages were then assessed and a judgment H sum was entered against the co-employee. The judgment sum was then given to the respondent herein (the employer's insurers) for payment but the respondent refused to make the payment. The appellant then brought a recovery action against the respondent under s. 96(1) of the Road Traffic Act 1967 ('RTA'). The I appellant's claim was dismissed by the sessions judge on the ground that his action was barred against the employer and co-

employee by virtue of an amendment to s. 31 ('the amended s. 31') by the Employees Social Security (Amendment) Act 1992 (Act A814). The amendment had been made retrospective and included the appellant's claim. The appellant's appeal to the High Court was dismissed on similar grounds as that of the sessions court but with an addition that since the judgment in the initial action was not against the employer as the insured, the recovery action could not be maintained against the respondent. The appellant now appealed on the following three grounds: (1) that s. 31 did not prohibit the appellant's claim for common law damages; (2) the interlocutory judgment was obtained against his co-employee before the amended s. 31 came into effect and therefore based on the case of *Tan Peng Loh v. Lee Aik Fong & Anor*, the appellant was not prohibited from recovering the judgment sum against the co-employee; and (3) the employer and the co-employee had amended their defences to include s. 31 and as the respondent assumed the role of employer and co-employee, the same line of defence could not be raised again by virtue of the doctrine of *res judicata*.

**Held (dismissing the appeal) (unanimous decision)**
**Per James Foong JCA (Heliliah Mohd Yusof JCA concurring):**

**(1)** Even if the appellant succeeded in claiming against the employer and co-employer for damages under the common law, the amended s. 31 expressly prohibited recovery of damages "... under any other law". That prohibition extended to the respondent as insurer by virtue of s. 96(1) of the RTA for having issued a third party risk policy covering the employer and/or the employee. That was only a natural extension since the liability of the insured had been taken over by the insurer. (para 21)

**(2)** An interlocutory judgment was a judgment for damages to be assessed. It was not a final decision. Not being a final decision, it could not be used to enforce a claim against an insurer in a recovery action. Section 96(1) RTA demanded that the insurer do pay to the person entitled to the benefit of the judgment "any sum payable". The phrase "any sum payable" referred to a judgment that had damages ascertained rather than one of an interlocutory nature with damages still waiting to be assessed. That must be the intention of the legislature. Liability of the respondent as insurer to pay could

only come into effect after damages was assessed and by the time it was assessed, the amended s. 31 had come into force retrospectively. (para 23)

**(3)** The employer did not abandon the defence to include the amended s. 31 in the initial action. It was the appellant who withdrew his claim against the employer. It was therefore incorrect to allege that the issue had been litigated. Also, the issue was never abandoned as regards to the co-employee. It was not litigated as the appellant obtained a judgment in default against the co-employee. As such, *res judicata* was not applicable. (para 25 & 26)

**Per Abdul Malik Ishak JCA (separate concurring judgment):**

**(1)** By virtue of s. 31 before the relevant amendment, the appellant was barred from suing the employer. The appellant had no choice but to withdraw his action against the employer. With the withdrawal of the action by the appellant against the employer, the co-employee was driving the motor lorry on his own and not as a servant or agent of the employer. (paras 32, 33 & 34)

**(2)** At the time the appellant met with the accident, the prevailing s. 31 was the version before the relevant amendment. That version allowed him to pursue an action against the co-employee driver by virtue and on the strength of the case of *Tan Peng Loh v. Lee Aik Fong and Anor*. The relevant amendment to s. 31 disallowed an employee to pursue a claim against his fellow employee apart from his employer. The amendment was made to whittle down and circumvent the decision of *Tan Peng Loh*. Of significance was that the amended s. 31 was made retrospective to a date before the appellant had the accident and as effect must be given to the amendment, the appellant could not sue his employer or his co-employee. (paras 39, 40, 41 & 47)

**(3)** The then decision of *Sabah Pernas Construction & Anor v. Pitchakkaran* clearly held that an employee could not sue the employer for an employment injury but the employee could obtain judgment against the co-employee. However, the employee was barred from claiming damages against the employer under vicarious liability. It followed that any

judgment obtained against a fellow employee would be construed to be in his personal capacity and the fellow employee too would become personally liable to meet the claim. (para 51)

**(4)** The principle of *res judicata* did not apply. The employer did not abandon the defence under s. 31 in the initial action. It was the appellant who withdrew his claim against the employer, therefore leaving intact the defence under s. 31. As against the co-employee, the defence under s. 31 was never litigated nor abandoned. (paras 52 & 53)

**(5)** An insurance company only indemnifies the insured when there is a judgment against the insured. In the present case, since no judgment was obtained against the employer as the insured, there was nothing for the insurer to indemnify. It followed that any action against the respondent must be dismissed. (paras 61 & 62)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu mengalami kecederaan teruk apabila tangki gas yang berada atas motorlori majikan beliau yang dipandu oleh rakan sekerjanya menghempapnya. Beliau memulakan tindakan kecuaian terhadap kedua-dua rakan sekerja dan majikan di Mahkamah Sesyen bagi mendapat gantirugi. Apabila disedari bahawa perayu adalah seorang penyumbang di bawah Akta Keselamatan Sosial Pekerja 1969 ('Akta SOCSO'), kedua-dua majikan dan pekerja meminda pembelaan mereka dengan mengatakan bahawa tuntutan perayu telah dihalang oleh s. 31 Akta SOCSO ('s. 31'). Perayu kemudian menarik balik tindakan terhadap majikan, tetapi meneruskan tindakan terhadap rakan sekerja. Rakan sekerja gagal menghadirkan diri di pendengaran, dan akibatnya satu penghakiman interlokutori telah diperolehi perayu. Gantirugi kemudian ditaksir dan satu jumlah penghakiman telah diputuskan terhadap rakan sekerja tersebut. Berikutnya jumlah penghakiman telah diserah kepada responden di sini (penanggung insurans majikan) untuk pembayaran, tetapi responden telah enggan membuat pembayaran. Perayu kemudian membawa satu tindakan tuntutan terhadap responden di bawah s. 96(1) Akta Pengangkutan Jalan 1967 ('APJ'). Tuntutan responden telah ditolak oleh hakim sesyen atas alasan bahawa tindakan terhadap majikan dan rakan sekerja telah menjadi terhalang disebabkan pindaan kepada s. 31('s. 31 terpinda') melalui Akta Keselamatan Sosial Pekerja (Pindaan) 1992 [Akta A814]. Pindaan tersebut telah dikuatkuasa secara retrospektif

dan merangkumi tuntutan perayu. Rayuan perayu ke Mahkamah Tinggi telah ditolak atas alasan serupa seperti yang dibuat oleh Mahkamah Sesyen, dan alasan tambahan bahawa oleh kerana penghakiman dalam tindakan awal bukan terhadap majikan selaku pengambil insurans, maka tindakan recovery tidak boleh diambil terhadap majikan. Perayu merayu atas tiga alasan berikut: (1) bahawa s. 31 tidak menghalang tuntutan perayu bagi mendapatkan gantirugi common law; (2) bahawa penghakiman interlokutori diperoleh terhadap majikan sebelum s. 31 terpinda berkuatkuasa dan oleh itu berdasarkan kepada kes *Tan Peng Loh v. Lee Aik Fong & Anor*, perayu tidak dihalang dari menuntut jumlah penghakiman dari rakan sekerja; dan (3) majikan dan rakan sekerja telah meminda pembelaan mereka bagi memasukkan s. 31 dan oleh kerana responden telah berperanan sebagai majikan dan rakan sekerja, pembelaan yang serupa tidak boleh dibangkitkan sekali lagi berdasarkan doktrin *res judicata*.

**Diputuskan (menolak rayuan) (sebulat suara)**
**Oleh James Foong HMR (Heliliah Mohd Yusof HMR menyetujui)**

**(1)** Jikapun perayu berjaya dalam tuntutan terhadap majikan dan rakan sekerja untuk gantirugi di bawah common law, s. 31 terpinda secara expres telah melarang sebarang pemerolehan gantirugi "... di bawah mana-mana undang-undang". Larangan ini terpakai kepada responden selaku penanggung insurans mengambilkira s. 96(1) APJ yang mengeluarkan polisi insurans pihak ketiga yang merangkumi majikan dan/atau pekerja. Ini adalah satu akibat semulajadi oleh kerana liabiliti pengambil insurans telah diambil alih oleh penanggung insurans.

**(2)** Penghakiman interlokutori adalah satu penghakiman bagi gantirugi yang akan ditaksir. Ia bukanlah satu keputusan yang muktamad. Disebabkan bukan suatu keputusan muktamad, maka ia tidak boleh digunakan bagi melaksanakan tuntutan terhadap penanggung insurans melalui tuntutan recovery. Seksyen 96(1) APJ mengkendaki penanggung insurans supaya membayar kepada orang yang berhak kepada manfaat penghakiman "mana-mana jumlah yang kena dibayar". Frasa "mana-mana jumlah yang kena dibayar" merujuk kepada penghakiman di mana gantirugi sudah ditaksir dan bukannya kepada penghakiman interlokutori di mana gantirugi belum dan masih menunggu untuk ditaksirkan. Inilah yang diniatkan oleh

badan perundangan. Liabiliti responden selaku penanggung insurans untuk membayar hanya boleh berbangkit apabila gantirugi telah ditaksir. Malangnya, apabila ianya ditaksir s. 31 terpinda telah pun berkuatkuasa secara retrospektif.

**(3)** Majikan bukan meninggalkan pembelaan untuk memasukkan s. 31 di dalam tindakan awal. Sebaliknya, perayulah yang telah menarik balik tuntutan terhadap majikan. Oleh itu adalah tidak benar untuk mengatakan bahawa isu telah pun dilitigasikan. Juga, isu berkaitan dengan rakan sekerja tidak pernah ditinggalkan. Ia tidak dilitigasikan oleh kerana perayu telah memperoleh penghakiman ingkar terhadap rakan sekerja. Oleh itu, *res judicata* adalah tidak terpakai.

**Oleh Abdul Malik Ishak HMR (menyetujui melalui penghakiman berasingan)**

**(1)** Disebabkan oleh s. 31 sebelum pindaan, perayu telah dihalang dari mendakwa majikan. Perayu tiada pilihan melainkan menarik balik tindakannya terhadap majikan. Dengan penarikan balik tindakan oleh perayu terhadap majikan, rakan sekerja telah memandu motorlori secara sendirian dan peribadi dan bukannya sebagai pekerja atau agen majikan.

**(2)** Semasa perayu menemui kemalangan, s. 31 yang berkuatkuasa ketika itu adalah versi yang terpakai sebelum pindaan berkenaan. Versi tersebut membenarkan beliau meneruskan dakwaan terhadap rakan sekerja pemandunya dan juga berdasarkan kes *Tan Peng Loh v. Lee Aik Fong and Anor.* Pindaan yang dibuat terhadap s. 31 telah melarang seorang pekerja untuk mendakwa rakan sekerjanya selain dari majikannya. Pindaan dibuat bagi tujuan menumpulkan dan mengelak keputusan *Tan Peng Loh*. Yang penting adalah bahawa s. 31 terpinda dikuatkuasakan secara kebelakangan sehingga ke tarikh sebelum perayu mengalami kemalangan, dan oleh kerana pindaan perlu diberikan kesannya, maka perayu tidak boleh mendakwa majikannya ataupun rakan sekerjanya.

**(3)** Keputusan di dalam *Sabah Pernas Construction & Anor v. Pitchakkaran* jelas menunjukkan bahawa seorang pekerja tidak boleh mendakwa majikannya atas kecederaan pekerjaan tetapi boleh mendapat penghakiman dari rakan sekerja. Bagaimanapun, pekerja dihalang dari menuntut gantirugi dari majikan di bawah

liabiliti vikarius. Ianya mengikut bahawa sebarang penghakiman yang diperolehi dari seorang rakan sekerja akan ditafsirkan sebagai diperolehi dalam kapasiti peribadi dan pekerja juga akan mempunyai tanggungan secara peribadi untuk menjelaskan tuntutan.

**(4)** Prinsip *res judicata* tidak terpakai. Majikan tidak meninggalkan pembelaan di bawah s. 31 di dalam tindakan awal. Sebaliknya perayu yang telah menarik balik tuntutan terhadap majikan, sekaligus tidak menjejaskan pembelaan di bawah s. 31. Berhubung dengan rakan sekerja, pembelaan di bawah s. 31 tidak pernah dilitigasi ataupun ditinggalkan.

**(5)** Sebuah syarikat insurans hanya menggantirugi pengambil insurans. Dalam kes semasa, oleh kerana tiada penghakiman diperolehi terhadap majikan, maka tiada apa yang perlu digantirugikan oleh penanggung insurans. Ianya mengikut bahawa sebarang tindakan terhadap responden haruslah ditolak.

**Case(s) referred to:**

*Basser v. Medical Board of Victoria [1981] VR 953* ***(refd)***

*Chamberlain v. Deputy Commissioner of Taxation [1987-1988] 164 CLR 502* ***(refd)***

*Cole v. Austin Distributors Ltd [1953] VLR 155* ***(refd)***

*Henderson v. Henderson [1843] 67 ER 3 Hare 100* ***(refd)***

*In re A Solicitor's Clerk [1957] 1 WLR 1219* ***(refd)***

*Johnson v. Gore Wood & Co (a firm) [2002] 2 AC 1* ***(refd)***

*Maganja v. Arthur Trading as Shirley Arthur's Beauty Centre [1984] 3 NSWLR 561* ***(refd)***

*Pinnock Brothers v. Lewis and Peat, Limited [1923] 1 KB 690* ***(refd)***

*Pople v. Evans [1969] 2 Ch 255* ***(refd)***

*Port of Melbourne Authority v. Anshun Proprietary Limited [1980-1981] 147 CLR 589* ***(refd)***

*Rafiah Bakar v. East-West UMI Insurance Bhd [1993] 1 CLJ 431 HC* ***(refd)***

*Ramli Shahdan & Anor v. Motor Insurer's Bureau of West Malaysia & Anor [2006] 1 CLJ 224 CA* ***(refd)***

*Reid v. Reid [1886] 31 Ch D 402* ***(refd)***

*Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan [1982] CLJ 151; [1982] CLJ (Rep) 299 FC* ***(refd)***

*Satyadhyan Ghosal and Others v. Smt. Deorajin Debi and Another, AIR [1960] SC 941* ***(refd)***

*Tan Peng Loh v. Lee Aik Fong & Anor [1981] 1 CLJ 167; [1981] CLJ (Rep) 96 HC* ***(refd)***

A *The Queen, On The Prosecution of Certain Justices of Leeds v. Vine [1874-75] 10 LR QB 195* ***(refd)***
*West v. Gwynne [1911] 2 Ch 1* ***(refd)***

**Legislation referred to:**
B Road Transport Act 1987, ss. 90(1), 91(1)(b), 96(1), (2)
Employees' Social Security Act 1969, s. 31
Employees' Social Security (Amendment) Act 1992, ss. 1, 20

Solicitors (Amendment) Act 1956 [UK], s. 11(1)
Wine and Beer Amendment Act 1870 [UK], s. 14

C **Other source(s) referred to:**
*Halsbury Laws of England,* 4th edn, vol 28, para 506
Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law,* p 188

D *For the appellant - Americk Sidhu; M/s Isharidah, Ho, Chong & Menon*
*For the respondent - S Kanagasabapathi; M/s Kanaga, Suresh & Co*

*Reported by Usha Thiagarajah*

E

## JUDGMENT

### James Foong JCA:

### Background

F **[1]** The appellant was an employee of Syarikat Pengangkutan Sri Selatan Sdn Bhd (the employer). On or about 12 June 1987, in the course of his employment he was injured by a gas tank which fell on him from his employer's motor lorry bearing registration number WBE 3310. This lorry was, at the material time, driven
G by his co-worker one Ramli bin Osman (co-employee). The accident happened when the lorry, while reversing, hit a pot hole and caused the gas tanks which were then on the lorry to fall off and hit the plaintiff. As a result of this accident, the appellant was injured.

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**[2]** The appellant instituted a civil action in the Sessions Court at Kuala Lumpur bearing number 63-399-1988 against the co-employee as the first defendant and the employer as the second defendant. I shall refer to this civil action as the negligence action.

I

**[3]** In the course of the negligence action, it came to light that the appellant was a contributor to the Employees' Social Security created under SOCSO Act.

**[4]** Under s. 31 of the SOCSO Act 1969:

> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person:
>
> (i) any compensation under the Workmen's Compensation Ordinance, 1952, or
>
> (ii) damages under any other law for the time being in force, in respect of an employment injury sustained as an employee under this Act. (emphasis added)

**[5]** When this was disclosed, both the employer and co-employee amended their defences to make use of this provision of the law. Upon this, appellant withdrew his claim against the employer but maintained his action against the co-employee. As both employer and co-employee had engaged a common solicitor to defend them in this action, this solicitor discharged himself from acting for the co-employee. On 17 January 1992 which was the day fixed for hearing, the co-employee failed to turn up in court. As a result of this, interlocutory judgment was entered against him with damages to be assessed. On 19 September 1992, damages was assessed at RM90,992 with interest thereon and costs at RM6,790.50.

**[6]** Since the injury of the appellant was as a result of a road accident, the appellant gave notice to the respondent, as insurer under s. 96(2) Road Transport Act 1987 (RTA) of a third part risks policy taken by the employer for the motor lorry. The respondent refused to satisfy the judgment sum obtained in the negligent action. This resulted in the appellant commencing this recovery action (recovery action) against the respondent under s. 96(1) RTA. This section specifies:

> If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer

A shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable hereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

B **[7]** The respondent defence in this recovery action was principally this: the appellant is prohibited from bringing this action against both employer and co-employee under s. 31(i) and (ii) of the SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act
C 1992].

**[8]** One must be reminded that when the recovery action was filed, s. 31 of the SOCSO Act 1969 had been amended by the SOCSO Act of 1992 [editor's note: SOCSO Act 1969 as
D amended by the Employees' Social Security (Amendment) Act 1992]. This new s. 31 of the SOCSO Act of 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992] reads:

E An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, **or from any other person who is a servant of the employer,** any compensation or damages under any law for the time being in force in respect of an employment injury sustained as an employee under this Act. (emphasis added)

F **[9]** The new addition (as emphasized above) to s. 31 of the SOCSO Act was due to the Federal Court judgment in *Tan Peng Loh v. Lee Aik Fong & Anor.* [1981] 1 CLJ 167; [1981] CLJ (Rep) 96 which says "that in the absence of express exclusion of fellow
G employees (in s. 31 of the SOCSO Act 1969) the right to recover from the 1st respondent, a fellow employee remains".

**[10]** Section 31 of the SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992] therefore reversed the law regarding
H "fellow employee" mentioned in *Tan Peng Loh v. Lee Aik Fong & Anor. (supra)*. In addition to this, this amendment was to take effect retrospectively by virtue of s. 1 of the SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992] which says:
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S. 31 shall be deemed to have come into force on 1st July 1985.

**[11]** It is upon these provisions of the SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992] that the respondent in this appeal before us maintained that the appellant's recovery action against them should be dismissed.

**[12]** I shall now give a chronology of events relating to the recovery action. The appellant initiated this recovery action in the Sessions Court. After a full trial, the Sessions Court dismissed this appellants' claim on the ground that the appellant was not allowed to bring an action against the employer and the co-employee by virtue of s. 31 of the SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992] (made retrospective to 1 July 1985 to include the time of the appellant's accident) and a *fortiori* similarly barred the appellant from bringing this recovery action against the respondent.

**[13]** Dissatisfied with this, the appellant appealed to the High Court. His appeal was dismissed on the same ground as the Sessions Court with the addition that since the judgment in the negligence action was not against the employer as the insured, this recovery action cannot be maintained against the respondent.

**[14]** It is on this decision of the High Court that this appeal is before this court.

**[15]** In this appeal the appellant relied basically on three grounds. I shall deal with each in turn. But before I do so, allow me to comment on the part of the judgment of the High Court relating to the conclusion that since the judgment in the negligence action was not against the employer, the recovery action cannot succeed.

**[16]** I would first like to point out that s. 90(1) of the RTA specifies that:

> it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.

**[17]** And under s. 91(1)(b) of the RTA, such a third party risks insurance policy must be a policy which:

A insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road: …

B **[18]** When such an insurance policy covers "such person, or class of persons as may be specified in the policy", the insured would include not only the employer but also the co-employee for whom the employer had given permission to drive the lorry at the material time of the accident. This relationship of a master and C servant and/or agent related between the employer and the co-employee was pleaded by the appellant in his statement of claim in the negligence action. Thus, when judgment was obtained against the co-employee who drove the lorry with the consent of the employer, the compulsory insurance policy against third party D risks was effective for the purpose of a recovery claim against the insurer. It is therefore incorrect for the High Court to say that because no judgment was obtained against the employer, a recovery action against the respondent cannot succeed.

E **[19]** I shall now deal with each of the grounds raised in this appeal.

1st Issue: Incorrect assumption of s. 31 SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992]

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**[20]** Though admitting that s. 31 of the SOCSO Act bars a claim against an employer and a co-employee, Mr. Americk Sidhu however argued that this does not prohibit a claim by the appellant for common law damages. He explained that the SOCSO scheme G set up by SOCSO Act involves collecting contributions from the employer for payment to an injured or disable workman based on the extent of his disability. However, under this scheme there is no award for pain and suffering and for loss of amenities. These common law damages were deprived from the injured worker and H for this he submitted that:

to correctly interpret the intended meaning of s. 31 as anticipated by the legislature to mean that an injured employee should not be prevented from pursuing the recovery of compensation he or she is entitled to obtain from any other party, other than his I employer, either directly or indirectly only because this would necessarily involved bringing an action against his or her employer or co-employer…

> The bringing of an action against the employer or a co-employer is a right that has never been taken away from an injured employee by statute. The only right that an injured employee has been deprived of is the right to receive or recover any compensation directly from his employer or co-employee.

**[21]** I find this argument unacceptable. Even if the appellant may succeed in claiming against the employer and co-employee for damages under common law, how is he going to receive or recover this in view of s. 31 of the SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992] which expressly says that the appellant as an insured person shall not be entitled to receive or recover from the employer and co-employee damages under any other law? And this prohibition, in my considered opinion, extends to the respondent as insurer by virtue of s. 96(1) of the RTA for having issued a third party risks policy covering the employer and/or the co-employee – see *Ramli Shahdan & Anor v. Motor Insurer's Bureau of West Malaysia & Anor* [2006] 1 CLJ 224 and *Rafiah bte Bakar v. East-West UMI Insurance Bhd* [1993] 1 CLJ 431. This is only a natural extension since the liability of the insured has been taken over by the insurer. For this reason I find that the courts below had not erred in arriving at the conclusions they did.

**2nd Issue: Interlocutory Judgment Obtained Before The Coming Into Effect Of s. 31 SOCSO Act 1992** [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992]

**[22]** The appellant then argued that he has obtained a judgment against the co-employee before s. 31 in the SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992] came into effect. Thus, based on the ruling in *Tan Peng Loh v. Lee Aik Fong & Anor (supra)*, the appellant is not prohibited from recovering from the co-employee. If the appellant can succeed against the co-employee, conversely he can succeed against the respondent under s. 96(1) of the RTA.

**[23]** I again cannot subscribe to this view. I wish to point that an interlocutory judgment is a judgment for damages to be assessed (as described in *Halsbury Laws of England*, 4th edn, vol 28, at para 506). It is not a final decision. Not being a final decision, it cannot be used to enforce a claim against an insurer in a recovery action. This is for reason that s. 96(1) of the RTA

demands that the insurer do pay to the person entitled to the benefit of the judgment "any sum payable". This phase "any sum payable" must surely, in my opinion, be referring to a judgment which has damages ascertained rather than one of an interlocutory nature with damages still awaiting to be assessed. This must be the intention of the Legislature. So liability of the respondent as insurer to pay could only come into effect after damages was assessed and by the time it was assessed, s. 31 SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992] was gazetted making this new provision of the law retrospective.

### 3rd Issue: Does *Res Judicata*

**[24]** The last contention of the appellant is this: in the negligence action, both the employer and co-employee had amended their defences to include s. 31 of the SOCSO Act 1992 [editor's note: SOCSO Act 1969 as amended by the Employees' Social Security (Amendment) Act 1992]. Though pleaded, this line of defence was not pursued. Now that the respondent has assumed the role of the employer and co-employee, this same line of defence cannot be raised again when it was previously abandoned by the employer and co-employee. In short, the respondent cannot re-agitate the same issue.

**[25]** I find this contention unacceptable. First, the employer did not abandon this defence in the negligence action. It was the appellant who withdrew his claim against the employer. It is therefore incorrect to allege that this issue has been litigated.

**[26]** Second, as regards to the co-employee, this issue was never abandoned. It was just not litigated when the appellant just obtained judgment in default against the co-employee. As this defence was never litigated or abandoned *res judicata* is not applicable.

### Conclusion

**[27]** For reasons aforesaid, this appeal should be dismissed this appeal with costs; the order of the High Court dated 27 March 2006 affirmed and; the deposit for this appeal be paid to the respondent towards account of taxed costs.

**[28]** Both my sister judge, Heliliah Mohd Yusof, and brother judge, Abdul Malik Ishak, had read this judgment in draft and are associating themselves with it.

**Abdul Malik Ishak JCA:**

## Introduction

**[29]** This is my supporting judgment to the well written judgment of my learned brother James Foong Cheng Yuen, FCJ on an interesting subject matter which would certainly be of interest to all insurers as well as to all insureds. This judgment brings into sharp focus the rigours of the Employee's Social Security Act 1969 (SOCSO Act). The plaintiff appellant sued his co-employee by the name of Ramli bin Osman in the Sessions Court at Kuala Lumpur as the first defendant and against his employer Syarikat Pengangkutan Sri Selatan Sdn Bhd as the second defendant in a civil action grounded on negligence. The plaintiff appellant whilst in the process of directing and assisting the co-employee driver in reversing the motor lorry bearing registration number WBE 3310 was hit on the leg by a gas cyclinder which fell off from the back of the motor lorry when the said motor lorry hit a pot hole. As a result of that unfortunate accident, the plaintiff appellant sustained severe injuries. The plaintiff appellant sued the co-employee driver as a servant or agent of the second defendant.

**[30]** At the time of the unfortunate accident, which was on 12 June 1987, it transpired that the plaintiff appellant was a contributor to the Employees' Social Security and this prompted the second defendant employer to amend the statement of defence by adding the following particulars:

> 8. The defendants will aver that the plaintiff was an employee of the second defendant.
>
> 9. The plaintiff was a SOCSO contributor *vide* SOCSO No F3363413A.
>
> 10. The defendants will contend that the plaintiff's claim is barred by section 31 of the SOCSO Act.

**[31]** At the time of the accident, the relevant s. 31 of the SOCSO Act was worded as follows (hereinafter referred to as the "original version"):

> **31. Employer's liability**
>
> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person:

A (i) any compensation under the Workmen's Compensation Ordinance, 1952, or

(ii) damages under any other law for the time being in force, in respect of an employment injury sustained as an employee under this Act.

B

**[32]** What it amounts to is this. That by virtue of the original version of s. 31 of the SOCSO Act, the plaintiff appellant is barred from suing the second defendant who was the employer of the plaintiff appellant. The plaintiff appellant's solicitors had no choice C but to withdraw the plaintiff appellant's action against the second defendant employer. This was done on 11 October 1991.

**[33]** It must be borne in mind that the writ action was filed in the Sessions Court at Kuala Lumpur on 14 September 1988 and D it was also dated on the same day. Interestingly, the plaintiff appellant's statement of claim contained the following salient averments as seen at p. 30 of the appeal record. I shall now reproduce them *verbatim*:

E 3. The 2nd defendant was at all material times to this action, the owner of motor lorry No: WBE 3310.

4. The 1st defendant was at all material times to this action, the servant or agent of the 2nd defendant.

F 6. The said accident was caused by the negligence of the 1st defendant, a servant or agent of the 2nd defendant.

**[34]** Now, it is quite apparent that with the withdrawal of the action by the plaintiff appellant against the second defendant employer, the above mentioned paragraphs in the statement of G claim are no longer relevant because the second defendant employer is no longer in the equation. That being the case, the co-employee driver by the name of Ramli bin Osman cited as the first defendant was driving the said motor lorry on his own and not as a servant or agent of the second defendant employer.

H

**[35]** In the proceedings before the Sessions Court at Kuala Lumpur, Pacific & Orient Insurance Co Sdn Bhd the insurers of the second defendant employer appointed a firm of solicitors Messrs RK Nathan & Co to defend the first defendant co-I employee driver and the second defendant employer. It was this legal firm that discovered, in the course of the proceedings in the Sessions Court at Kuala Lumpur, that the plaintiff appellant was

a contributor under the SOCSO Act and the solicitors then proceeded to amend the defence to plead the SOCSO point as alluded to earlier.

**[36]** Now, after the plaintiff appellant withdrew his claim against the second defendant employer, he pursued the matter against the first defendant co-employee driver. In due course, Messrs R K Nathan & Co discharged themselves from acting for the first defendant co-employee driver.

**[37]** The plaintiff appellant's matter then proceeded in the Sessions Court at Kuala Lumpur in the absence of the first defendant co-employee driver. Interlocutory judgment was entered against the first defendant co-employee driver due to non-appearance on the day of the hearing. Damages were then assessed and, finally, a judgment sum was entered against the first defendant co-employee driver. The judgment sum was transmitted to the respondent insurers namely Pacific & Orient Insurance Co Sdn Bhd but the insurers refused to make any payment. Thus, the plaintiff appellant was compelled to file a suit against the respondent insurers in the High Court under s. 96(1) of the Road Traffic Act 1987 for the recovery of the judgment sum (hereinafter referred to as "the recovery action").

**[38]** A defence to this recovery action was eventually filed and due to the jurisdictional changes that surfaced at that point of time, an application to transfer the proceedings to the Sessions Court at Kuala Lumpur was made. In due course, the matter eventually came up for hearing at the Sessions Court at Kuala Lumpur on a number of occasions. On 30 September 2003, the plaintiff appellant's claim in the recovery action was eventually dismissed by the Sessions Court at Kuala Lumpur. Aggrieved by that decision, the plaintiff appellant filed an appeal to the High Court. Upon hearing the appeal, the High Court also dismissed the plaintiff appellant's appeal. Hence, the present appeal to this court.

**[39]** Now, at the time when the plaintiff appellant met with that unfortunate accident, the prevailing s. 31 of the SOCSO Act was the original version that was reproduced earlier. And when the plaintiff appellant commenced the initial action at the Sessions Court at Kuala Lumpur against the co-employee driver and the employer as the first defendant and the second defendant respectively, the original version of s. 31 of the SOCSO Act

allowed him to pursue an action against the co-employee driver by virtue and on the strength of the case of *Tan Peng Loh v. Lee Aik Fong & Anor.* [1981] 1 CLJ 167; [1981] CLJ (Rep) 96, FC. In that case, Abdul Hamid Omar FJ at the court of first instance had this to say in regard to the original version of s. 31 of the SOCSO Act:

> In my view section 31 clearly prohibits the plaintiff or his dependants from receiving or recovering from his employer damages under any other law in respect of an employment injury sustained as an employee under the Act. The Act has very clearly extinguished the right of an employee to a common law remedy.

**[40]** It must be emphasised that *Tan Peng Loh* made no mention, at all, of a prohibition disallowing a worker from pursuing a claim against his fellow employee or co-worker based on the wording of the original version of s. 31 of the SOCSO Act. So, being encouraged by *Tan Peng Loh*, the plaintiff appellant continued to pursue his claim against the co-employee driver as the first defendant notwithstanding the withdrawal of his claim against the second defendant employer.

**[41]** Events moved fast. The original version of s. 31 of the SOCSO Act was amended by way of a publication in the gazette on 20 February 1992 which disallowed an employee to even pursue a claim against his fellow employer or co-worker. This amendment was obviously made to whittle down and circumvent the decision of *Tan Peng Loh*. Of significance is this. That the amendment was made retrospective to take effect from the 1 July 1985 which meant that the amendment went far back to a date before the plaintiff appellant had that unfortunate accident. Legally speaking the amendment would have prevented the plaintiff appellant from filing the initial action on 14 September 1988. The amended s. 31 of the SOCSO Act reads as follows:

> **31. Liability of employer and his servant**
>
> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act.

**[42]** According to *Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law*, at p. 188:

> A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective or retroactive.

**[43]** In *West v. Gwynne* [1911] 2 Ch. 1, CA, Buckley LJ had this to say at p. 12 of the report:

> As (*(sic)* (a)) matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe the section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning.

**[44]** And even in an Act which is held to be retrospective, Bowen LJ in *Reid v. Reid* [1886] 31 Ch. D 402, at p. 409, said:

> That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.

**[45]** In *The Queen, On The Prosecution of Certain Justices of Leeds v. Vine* [1874-75] 10 LR QB 195, section 14 of the Wine and Beer Amendment Act 1870, which provided that "every person convicted of felony shall for ever be disqualified from selling spirits by retail" and if he should take out or have taken out a licence for that purpose it should be void, was held to apply to a man who had been convicted before, but had obtained a licence after the Act was passed, apparently on the ground that the object of the Act was to protect and ensure that public beer houses were not kept by men of bad character.

**[46]** In *In re A Solicitor's Clerk* [1957] 1 WLR 1219, the disciplinary committee of the Law Society made an order under the Solicitors (Amendment) Act 1956 s. 11(1), directing that without the permission of the Law Society no solicitor should thereafter employ the appellant, an unadmitted solicitor's clerk, who had been convicted of larceny in 1953. In reply to the contention that the committee was giving retrospective effect to the 1956 Act, it was held that the order was valid even though the Act was not retrospective.

**[47]** Here, the amended s. 31 of the SOCSO Act was made retrospective by way of a gazette notification dated 20 February 1992 and it was to take effect from 1 July 1985 and I must give effect to it. There are no two ways about it.

**[48]** What it boils down to is this. That the plaintiff appellant cannot sue his employer (the second defendant) or his co-employee driver (the first defendant) and for these reasons the insurers Pacific & Orient Insurance Co Sdn Bhd are reluctant to pay the plaintiff appellant the judgment sum in question.

**[49]** Going on an uphill task, the learned counsel for the plaintiff appellant invited this court to make a decision on an issue which, according to him, have eluded both the bar and the bench over the past 30 years because wrong presumptions have been made regarding the interpretation of the original version of s. 31 of the SOCSO Act. With respect, the late *Tara Singh Sidhu* in *Tan Peng Loh (supra)* made a valiant attempt of this nature but Wan Suleiman FJ delivering the judgment of the Federal Court held that an action against the employer under the original version of s. 31 of the SOCSO Act bars the employee from suing the employer.

**[50]** And the same issue was raised, once again, in *Sambu Pernas Construction & Anor. v. Pitchakkaran Krishnan* [1982] CLJ 151; [1982] CLJ (Rep) 299, where Salleh Abas FJ who delivered the judgment of the Federal Court aptly said:

> There are two previous decisions of the Federal Court on section 31 of this Act. The first decision is the case of *Che Noh bin Yacob v. Seng Hin Rubber (M) Sdn. Bhd.* [1982] 1 MLJ 80 in which the court held that sections 31 and 42 bar an insured person from suing his employer in respect of an employment injury suffered by him. In the second decision in the case of *Tan Peng Loh @ Lam Peng Low v. Lee Aik Fong @ Aik Kong & Anor.* [1982] 1 MLJ 74 the court reiterated its earlier judgment, and further held that although an insured person cannot sue his employer for damages in respect of employment injury, section 31 does not prevent him from suing a third party, such as his co-employee, whose negligence has caused injury to him.

**[51]** From the decision in *Sambu Pernas* it is clear that an employee cannot sue the employer for an employment injury but the employee could obtain judgment against the co-employee then. But the employee is barred from claiming damages against the employer under vicarious liability. What this amounts to is this.

That any judgment obtained against the fellow employee would be construed to be in his personal capacity and the fellow employee too would become personally liable to meet the claim.

**[52]** I agree with the views of my learned brother James Foong Cheng Yuen, FCJ that the principle of *res judicata* does not apply. The second defendant employer did not abandon the defence under the original version of s. 31 of the SOCSO Act in the initial action before the Sessions Court at Kuala Lumpur. Rather it was the plaintiff appellant who withdrew his claim against the second defendant employer. Thus, leaving intact the defence under the original version of s. 31 of the SOCSO Act.

**[53]** And in so far as the co-employee driver who was cited as the first defendant was concerned, again the defence under the original version of s. 31 of the SOCSO Act was never litigated nor abandoned. It was simply not litigated at all.

**[54]** Authorities on *res judicata* are abound. For starters, reference to the case of *Henderson v. Henderson* [1843] 67 ER 3 Hare 100 should be referred to. There Wigram VC at p. 115 had this to say:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

**[55]** In *Satyadhyan Ghosal and Others v. Smt. Deorajin Debi and Another*, AIR [1960] SC 941, at p. 943 the court said that:

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res is judicata,* it shall not be adjudged again.

**[56]** Lord Bingham in *Johnson v. Gore Wood & Co (a firm)* [2002] 2 AC 1, HL, at p. 31, [2002] 2 WLR 72, at p. 90 had this to say about *res judicata*:

> The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.

**[57]** The case of *Chamberlain v. Deputy Commissioner of Taxation* [1987-1988] 164 CLR 502, FC is another good illustration. There the deputy commissioner issued a writ in the Supreme Court of the Australian Capital Territory to recover the sum of $25,557.92 in unpaid income tax, naming Chamberlain as the defendant. Chamberlain owed the deputy commissioner ten times the amount claimed in the writ. He consented to judgment and paid the judgment debt. Four days later the deputy commissioner issued a second writ claiming the balance of the debt amounting to $230,021.28. The High Court unanimously held that the deputy commissioner's cause of action had merged in the earlier judgment, raising a *res judicata* which stopped him from vexing Chamberlain with another suit on the same cause of action.

**[58]** A *res judicata* only arises from a judgment on the merits. But no *estoppel* arises from: a final order which is not a judgment (*Maganja v. Arthur Trading as Shirley Arthur's Beauty Centre* [1984] 3 NSWLR 561, at 564 per Yeldham J); a verdict which was not followed by a judgment (*Basser v. Medical Board of Victoria* [1981] VR 953 at 976); an acceptance of a sum paid into court (*Cole v. Austin Distributors Ltd.* [1953] VLR 155 at 158); a dismissal of an action for want of prosecution (*Pople v. Evans* [1969] 2 Ch. 255); and for lack of jurisdiction (*Pinnock Brothers v. Lewis and Peat, Limited* [1923] 1 KB 690 at 696).

**[59]** The bulk of the authorities which I have read laid down this simple principle of law. That *res judicata* prevents the re-agitation of the same cause of action in later proceedings. One may ask, what amounts to a cause of action? Brennan J, in *Port of Melbourne Authority v. Anshun Proprietary Limited* [1980-1981] 147 CLR 589, at p. 611 gave the following answers:

(a) it refers to the series of facts which the plaintiff must allege and prove to substantiate a right to judgment;

(b) it also refers to the legal right which has been infringed; and

(c) it makes reference to the substance of the action as distinct from its form.

**[60]** None of these principles would apply to the facts of the present appeal. In my judgment, *res judicata* do not apply in this appeal.

**[61]** Finally, an insurance company like Pacific & Orient Insurance Co Sdn Bhd only indemnifies the insured like the second defendant employer when there is a judgment against the insured. Here, since no judgment was obtained against the second defendant employer as the insured, there is nothing for the insurer to indemnify. The duty of an insurer to satisfy judgment is set out in s. 96(1) of the Road Transport Act 1987 which enacts as follows (the relevant parts only):

> **96. Duty of insurers to satisfy judgements against persons insured in respect of third party risks.**
>
> (1) If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

**[62]** Thus, any action against *Pacific & Orient Insurance Co Sdn Bhd* – the respondent herein, must be dismissed forthwith. And this was what the High Court did.

**[63]** Supportive of my learned brother James Foong Cheng Yuen, FCJ and for the reasons adumbrated above, I would make those orders as made by him.